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In the Supreme Court of the United States

OCTOBER TERM, 1998

AMERICAN RE-INSURANCE COMPANY
AND NAC REINSURANCE CORPORATION,

PETITIONERS,

V.

JOHN P. CRAWFORD, INSURANCE COMMISSIONER
OF THE STATE OF OKLAHOMA, AS RECEIVER OF
EMPLOYERS NATIONAL INSURANCE
CORPORATION,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE REINSURANCE ASSOCIATION OF AMERICA AND THE BROKERS AND REINSURANCE MARKETS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

This brief is filed on behalf of the Reinsurance Association of America ("RAA") and the Brokers and Reinsurance Markets Association ("BRMA"). The RAA is the principal voice of the American reinsurance industry. Its 29 member companies are reinsurers principally engaged in the business of assuming property and casualty reinsurance. Approximately half are owned by foreign parent companies. Together, RAA members write over 75% of the reinsurance written by American professional property and casualty reinsurers on domestic risks. The BRMA represents reinsurance brokers, professional reinsurers, and reinsurance departments of insurance companies, all of whom obtain business through reinsurance brokers.

Amici's members have a vital interest in the enforcement of their arbitration agreements. Because arbitration avoids the costliness and delays of litigation and permits the parties to take advantage of specialists familiar with insurance industry custom and usage, reinsurance contracts almost universally specify that all disputes between the reinsurer and insurer must be resolved through arbitration. In fact, the reinsurance industry has utilized the arbitration process since at least the early 1800's, when arbitration clauses were commonly used in English marine reinsurance contracts. RAA, *Manual for the Resolution of Reinsurance Disputes* 8 (1997). The arbitrability of disputes is particularly important in this industry because of its international scope. Reinsurers outside the United States account for approximately 42% of all reinsurance in the

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief, in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. Letters have been filed with the Clerk of the Court confirming that all parties have consented to the submission of this brief.

United States. RAA, *Alien Reinsurance in the U.S. Market:* 1996 Data 13 (1998). Of the 100 largest reinsurers in the world, only 27 are American. Reactions, *Standard & Poors Top 100 Insurers*, 29-46 (March 1998). Where contracts commonly cross numerous national boundaries, arbitration avoids the expense and costliness of protracted international litigation.

Strict enforcement by the federal courts of agreements to arbitrate are especially important where, as here, the insurer has been declared insolvent and entered liquidation.[2] *Amici* accordingly have sought to advance their members' interests by filing briefs in several cases involving challenges to the enforcement of arbitration clauses against liquidators hostile to federal arbitration rights. For example, they filed an *amici* brief in *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), in which this Court rejected the notion that the *Burford* abstention doctrine permits federal courts to abstain from enforcing arbitration agreements against liquidators of insolvent insurance companies.

In this case, Respondent achieved the very result—a refusal by the federal court to compel arbitration—that the liquidator failed to achieve in *Quackenbush*, this time under the aegis of the McCarron-Ferguson Act, 59 Stat. 33, 15 U.S.C. §1011 *et seq.* The Fifth Circuit held that provisions of the Oklahoma Uniform Insurers Liquidation Act ("OUILA") which vest exclusive original jurisdiction over insurer delinquency proceedings in a state court and authorize that state court to enjoin other actions against the insolvent insurer reverse preempt a reinsurer's right under the Federal Arbitration Act, 61 Stat. 669, 9 U.S.C. §§ 1-16, 201-08 (the "FAA") to enforce its arbitration agreement with the insolvent insurer. In addition, the Fifth Circuit held that the

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[2] Between 1969 and 1990, 372 property/casualty insurers in the United States became insolvent. A.M. Best, *Best's Insolvency Study: Property/Casualty Insurers, 1969-1990* 1-2 (June 1991).

McCarron-Ferguson Act empowers the state court to enjoin a reinsurer from even bringing an action to compel arbitration in federal court. Because the vast majority of states have adopted versions of the Uniform Insurers Liquidation Act ("UILA") or the Insurance Rehabilitation and Liquidation Model Act ("IRLMA") which include provisions similar to those at issue here,[3] the Fifth Circuit's decision threatens reinsurers' continuing ability to rely on the strict enforcement of their arbitration agreements.

The Fifth Circuit's decision is plainly wrong, and it exacerbates confusion in the lower courts about matters that are of vital importance to the reinsurance industry. If the decision stands, it will have adverse and far-reaching effects on domestic and international reinsurers. We believe this Court's review is urgently needed, and accordingly submit this brief in support of Petitioners.

SUMMARY OF ARGUMENT

In *Quackenbush*, this Court rejected the argument that a federal district court may not compel arbitration of a reinsurer's dispute with an insolvent insurer that is in liquidation. In that case, the petitioner argued that the policies underlying the McCarron-Ferguson Act favored abstention. Having lost that argument, liquidators nationwide retooled. They now argue that, as a matter of substantive law—not just policy—the McCarron-Ferguson Act prohibits the federal courts from enforcing arbitration agreements between reinsurers and insolvent insurers whenever state law designates a state court as the exclusive forum for delinquency proceedings. This argument profoundly misapprehends the scope of the McCarron-Ferguson Act. By adopting it in this case, the Fifth Circuit rendered *Quackenbush* a nullity and exacerbated confusion

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[3] III National Association of Insurance Commissioners ("NAIC"), *Model Laws, Regulations & Guidelines*, §§555-1, 555-63-67 (1998).

in the lower courts on a matter of critical significance to the U.S. reinsurance industry.

I. Contrary to the Fifth Circuit's decision in this case, a jurisdictional statute that establishes an exclusive state forum for insurer delinquency proceedings is not a law enacted for the purpose of regulating the business of insurance within the meaning of the McCarron-Ferguson Act. In *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 501-06 (1993), the Court explained that a law will be viewed as one enacted to regulate the business of insurance only if (i) it regulates the insurer-policyholder relationship or if (ii) it is necessary for the protection of policyholders. The provisions at issue in this case satisfy neither criteria. The centralization of all claims involving an insolvent insurer in a single state court affects the forum in which claims are adjudicated, not the parties' substantive rights. Moreover, the asserted benefits of this centralization—speedy and efficient administration of the liquidation—provide (at most) an indirect, tangential benefit to policyholders. Centralization of all litigation involving the insolvent insurer in state court is by no means *necessary* for the protection of policyholders. The Fifth Circuit's analysis of this issue conflicts squarely with that of the First Circuit in *Garcia v. Island Program Designer*, 4 F.3d 57 (1st Cir. 1993) (Breyer, J.).

The Fifth Circuit also erred when it held that arbitration of disputes between reinsurers and insolvent insurers would impair the operation of Oklahoma's liquidation process. To begin with, it is impossible to square this holding with the court of appeals' concession that the Oklahoma liquidating court itself might well compel arbitration of the dispute in question as a matter of state law. Further, the holding conflicts directly with this Court's repeated admonition that the adjudication of *in personam* claims by a forum other than the state court does not impair the administration of the liquidation or the payment of claims. Numerous courts of appeals have concluded that neither arbitration of

disputes between the liquidator and reinsurers nor litigation of federal claims against the liquidator in federal court impairs a state's centralized liquidation scheme. The Fifth Circuit concluded otherwise only by ignoring this Court's teachings. The Fifth Circuit acknowledged that this aspect of its decision conflicts with the decision of the Ninth Circuit in *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 972 (9th Cir. 1992), which it described as "a case very similar to the instant case." Pet. App. 22a n.6.

II. Although the Fifth Circuit professed that it was not holding that the state court has authority to enjoin Petitioners from seeking to enforce their federal rights under the FAA in federal court, its opinion cannot be read otherwise. In light of the court of appeals' acknowledgment that the state court might well compel arbitration in this case, its refusal to afford the same relief endorsed the state court's injunction against federal jurisdiction. The Fifth Circuit's decision cannot be reconciled with this Court's numerous holdings that state courts cannot enjoin parties from prosecuting *in personam* actions in federal court. Its suggestion that the McCarron-Ferguson Act empowers state courts to enjoin federal jurisdiction conflicts with the holding of the Eighth Circuit in *Murff v. Professional Med. Ins. Co.*, 97 F.3d 289 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 2452 (1997).

III. Because state insurer liquidation laws almost uniformly vest jurisdiction over delinquency proceedings in state courts, the decision of the Fifth Circuit poses a severe threat to reinsurers' ability to enforce their arbitration agreements under the FAA once insurers have become insolvent. This is a matter of critical importance, because in the reinsurance industry, which is international in scope, almost all contracts contain arbitration agreements, and reinsurers rely on arbitration for the prompt, efficient resolution of disputes.

The Fifth Circuit's suggestion that the need for efficient resolution of state delinquency proceedings precludes the

enforcement of arbitration agreements is directly contrary to congressional policy. The FAA was enacted to eliminate such judicial hostility to arbitration. This Court has not hesitated to intervene when the decisions of lower courts have threatened the substantial federal interest in the enforcement of arbitration contracts. Similar intervention is necessary in this case.

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING THAT THE FAA IS REVERSE PREEMPTED BY OKLAHOMA'S INSURER INSOLVENCY LAW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with rules applicable to other contracts, 9 U.S.C. § 2, and grants federal courts the power to enforce arbitration agreements by compelling arbitration, staying proceedings pending arbitration, and affirming arbitral awards, 9 U.S.C. § 3, 4, 9. In this case, the district court found that it had subject matter jurisdiction over Petitioners' suit and that Petitioners have the right to compel arbitration under the terms of their agreement with Respondent. The Fifth Circuit did not question either finding. Moreover, the Fifth Circuit identified no Oklahoma law that would preclude arbitration in these circumstances. Indeed, it conceded that the state court overseeing Respondent's liquidation might well compel arbitration under state law. Nonetheless, the court of appeals concluded that Petitioners' right to compel arbitration under the FAA was reverse preempted by Oklahoma law; in particular, by provisions of OUILA that vest exclusive original jurisdiction over delinquency proceedings in state court and authorize that court to enjoin other actions against the insolvent insurer. *See* Okla. Stat. Tit. 36 §§1901-03.

Section 2(b) of the McCarron-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The Fifth Circuit held (i) that the jurisdictional and injunction provisions of OUILA are "laws enacted ... for the purpose of regulating the business of insurance," and (ii) that enforcement of petitioners' arbitration rights under the FAA would "invalidate, impair, or supersede" these state laws. In both respects, the decision of the Fifth Circuit conflicts with the decisions of other courts of appeals[4] and with this Court's controlling precedents.

A. OUILA's Exclusive Jurisdiction and Injunction Provisions Are Not Laws Enacted for the Purpose of Regulating the Business of Insurance

This Court addressed the application of the McCarron-Ferguson Act to state insurer insolvency laws in *Fabe*. That case involved a conflict between a federal statute that provided the United States first priority with respect to a bankrupt debtor's obligations, 31 U.S.C. § 3713, and provisions of Ohio's insurance insolvency law that afforded

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[4] *See Garcia*, 4 F.3d at 61 (insolvency law that benefits policyholders only indirectly is not a "law[] enacted for the purpose of regulating the business of insurance") (quoting *Fabe*, 508 U.S. at 510-11)); *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 8 F.3d 953, 960-61 (3d Cir. 1993) (compelling arbitration of reinsurance dispute does not impair Pennsylvania insolvency law), *Murff*, 97 F.3d at 292 (federal action against insolvent insurer under Age Discrimination in Employment Act ('ADEA") does not impair Missouri insurer insolvency statute); *Bennett* 968 F.2d at 972-73 (compelling arbitration of reinsurance dispute does not impair Montana's insurer liquidation law); *but see Davister Corp. v. United Republic Life Ins. Co.*, 1998 U.S. App. LEXIS 21170 at *12-13 (10th Cir. Aug. 28, 1998) (adopting reasoning of the Fifth Circuit in this case); *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41, 44-45 (2d Cir. 1995) (holding that FAA was reverse preempted by Kentucky law that expressly precluded arbitration of disputes with insolvent insurers).

priority (in descending order) to (1) administrative costs and expenses, (2) employee wage claims, (3) policyholder claims, (4) general creditors' claims, and (3) government claims, Ohio Rev. Code Ann. § 3903.42 (1989). This Court concluded that the Ohio priority statute constituted a law enacted to regulate the business of insurance "to the extent that it regulate[d] policyholders," but that the Ohio statute was not a law enacted for the purpose of regulating the business of insurance "[t]o the extent that is [wa]s designed to further the interests of other creditors," *Fabe*, 508 U.S. at 508. Applying that standard, the Court held that the United States' super-priority was trumped by Ohio's statutory preferences for policyholders and administrative expenses. *Id.* at 509. The Court explained that the policyholder preference was specifically designed to further policyholder interests, and the preference for administrative expenses was "reasonably necessary to further the goal of protecting policyholders," since, "[w]ithout payment of administrative costs, liquidation could not even commence." *Id.* On the other hand, the Court ruled that the United States' super-priority was not reverse preempted by Ohio's preferences for employees and other creditors. Irrespective of whether these preferences might also "redound to the benefit of policyholders by enhancing the reliability of the insurance company," the Court found the connection between these preferences and the "ultimate aim of insurance ... too tenuous." *Id.* at 508, 509.

Then-Judge Breyer, writing for a unanimous court in *Garcia*, applied the standard articulated in *Fabe* to a challenge by the United States to a provision in Puerto Rico's insurance liquidation law that accorded lowest priority to claimants who missed the filing deadline. 4 F.3d at 62. He concluded that this provision—effectively a late-filer penalty—was not "enacted for the purpose of regulating the business of insurance" within the meaning of Section 2(b) of the McCarron-Ferguson Act, *id.* at 61, because it was "neither directed at, nor necessary for, the protection of

policyholders." *Id* at 62. The late-filer penalty was not "directed at" policyholders, he explained, because it "helps policyholders only to the extent that (and in the same way as) it helps all other creditors. That is to say, by penalizing late-filers, the Commonwealth provision may bring about more speedy, orderly liquidation proceedings, thereby (perhaps) reducing the risks (and costs) of extending credit to the company." *Id.* And it was not "necessary for the protection of" policyholders because, unlike the priority for administrative expenses at issue in *Fabe*, liquidation "would still prove manageable" without the late-filer penalty; "[a]t worst, the trustee's job would become slightly more difficult." *Id.*[5]

The Fifth Circuit's holding in this case that the provisions of OUILA centralizing insurer delinquency proceedings in a single state court are laws enacted for the purpose of regulating the business of insurance conflicts with *Fabe* and *Garcia*.[6] Like the preferences accorded

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[5] In *Boozell v. United States*, 979 F. Supp. 670 (N.D. Ill. 1997), a district court held that the federal priority statute was reverse preempted by the Illinois insurer insolvency law to the extent that the latter accorded a preference to the claims of state guaranty funds ahead of those of the United States. While *Boozell's* reasoning is problematic, the result was correct, and fully consistent with both *Fabe* and *Garcia*. State guaranty funds are specifically designed to protect policyholders of insolvent insurers by paying claims on covered policies, subject to certain specified dollar limits. Financed by assessments made against solvent insurers (*see, generally, Reinsurance* (R. Strain ed. 1980) 511 (1980)), these guaranty associations spread the risk of policyholder losses arising from insurer insolvencies among insurers underwriting the specific types of insurance that the insolvent insurer transacted. *Boozell*, 979 F. Supp. at 678. Guaranty associations are accorded the same priority as policyholders in insolvency proceedings because, having paid the policyholders' claims, they are deemed to be assignees of the policyholders' rights under the covered policies. *Id.* This statutory priority is unquestionably both directed at and necessary for the protection of policyholders.

[6] The lower courts' confusion respecting this issue is not limited to the Fifth Circuit. The Eighth Circuit, which held ultimately that Missouri's insolvency law could not preclude a federal court from resolving federal claims against an insolvent insurer, also believed that the State's

employee and general creditor claims in *Fabe* and the late-filer penalty at issue in *Garcia*, Oklahoma's determination to place control over issues relating to insurer delinquency proceedings in a single state court is neither "directed at" nor "necessary for the protection of" policyholders. And, unlike the preference accorded administrative claims in *Fabe*, the centralization of non-policyholder disputes in a single state court is not a necessary prerequisite to liquidation.

The Fifth Circuit concluded that OUILA's centralization of all disputes involving an insolvent insurer in one state court is "reasonably necessary to further the goal of protecting policyholders," because centralization promotes the orderly liquidation of claims and "prevents the dissipation of funds that would occur if the receiver had to defend unconnected suits in different forums across the country." Pet. App. 19a-20a.[7] The asserted benefits to

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provisions centralizing its insurer insolvency proceedings were laws enacted for the purpose of regulating the business of insurance. *Murff*, 97 F.3d at 291. *Accord Quackenbush v. Allstate Ins. Co.*, 121 F.3d 1372, 1381 (9th Cir. 1997); *Davister*, 1998 U.S. App. LEXIS 21170 at *13. The Second Circuit reached the same result by other means in *Stephens*, reasoning that Kentucky's scheme for liquidating insolvent insurers, *viewed in its entirety*, was a law enacted to regulate the business of insurance. *See* 66 F.3d at 44-45. Several courts, including the Fifth Circuit in this case, have noted the direct conflict between *Stephens*' statute-as-a-whole approach and *Garcia*'s careful parsing of the specific provision at issue. Pet. App. 17a.; *see also, e.g., Boozell*, 979 F. Supp. at 676-77. The Fifth Circuit acknowledged that *Stephens*' analysis was likely flawed. *See* Pet. App. 17a ("*Fabe's* holding and analysis suggest that a statute may require parsing to determine the extent of its preemptive power under the McCarron-Ferguson Act.").

[7] The Fifth Circuit also asserted that Oklahoma's policy "eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policyholders, who are often relying on policies with the same or similar language." Pet. App. 19a. This rationale is limited, however, to the resolution of policyholder claims. It does not apply to the resolution of disputes between the insolvent insurer and other third

policyholders of a more orderly and efficient liquidation[8] are, of course, the very same that the First Circuit rejected in *Garcia* as (at best) too indirect and tenuous. *Garcia*, 4 F.3d at 62; *see Davister*, 1998 U.S. App. LEXIS 21170, at *19 (Lucero, J, dissenting) ("Like the provision at issue in *Garcia*, a blanket stay of all arbitration proceedings is of general benefit to all creditors and not specifically for the benefit of policyholders"). Just as delinquency proceedings "would still [have] prove[d] manageable" in *Garcia* without Puerto Rico's late-filer penalty, Oklahoma's delinquency proceedings would prove manageable even if all disputes involving the insolvent insurer were not centralized in the state court. "At worst," here, as in *Garcia*, the liquidator's "job would become slightly more difficult." *Garcia*, 4 F.3d at 62.[9]

This aspect of the Fifth Circuit's holding also conflicts with *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982). In *Pireno*, an insurer utilized a peer review committee to resolve policyholder claims involving chiropractor services. Applying a now-familiar three-part test—which looks to whether the practice (i) "has the effect of transferring or spreading a policyholder's risk," (ii) is an integral part of the policy relationship," and (iii) "is limited

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parties, such as reinsurers, which arise from (and are limited to) the specific and unique terms of the parties' pre-liquidation contracts.

[8] The Fifth Circuit erred (and displayed an implicit hostility to arbitration) when it presumed that permitting arbitration would increase the cost and complexity of litigation. As this Court has recognized, arbitration proceedings generally are more streamlined and expeditious than litigation. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

[9] The centralization of all proceedings in the state court is not even viewed as essential by the State of Oklahoma. Although OUILA vests the liquidating court with exclusive original jurisdiction over core "delinquency proceedings," Okla. Stat. Tit. 36 §§ 1901, 1903, it explicitly provides that controverted claims that belong to claimants in reciprocal states may be proved in ancillary proceedings in those states. *Id.* at § 1916.

to entities within the insurance industry"—this Court held that the claims review process was not part of the "business of insurance." *Id.* at 129. The Court emphasized that the "challenged peer review arrangement [wa]s logically and temporally unconnected to the transfer of risk accomplished by [the] insurance policies" *id.* at 130, and that the insurer's "use of the [peer review committee] as an aid to its decisionmaking process [wa]s a matter of indifference to the policyholder, whose only concern is whether his claim is paid, not why it is paid," *id.* at 132.

Oklahoma's centralization of actions involving an insolvent insurance company in a single state court is similarly unconnected to the transfer of risk accomplished by insurance policies and is similarly a matter of indifference to policyholders.[10] Indeed, Oklahoma's scheme is even further removed from the business of insurance than was the peer review process in *Pireno;* whereas the peer review process applied only to policyholder claims, Oklahoma's law extends to all lawsuits against the insurer, even where (as here) the suit has nothing whatsoever to do with policyholders.

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[10] *Cf. Fragoso v. Lopez*, 991 F.2d 878 (1st Cir. 1993):

> Puerto Rico's insolvent insurers' liquidation provisions do not bear in the slightest on the substantive outcome of the appeal. These laws provide a procedure through which claims against the insurer can be resolved and its assets equitably distributed. They do not absolve the insurer of any substantive liability. There is no basis for concluding that this court will reach a result regarding the underlying merits of Fragoso's appeal that is any different from the result that a Puerto Rico court would reach, had it stayed the action, or that the liquidator's forum would reach, had the action been forwarded there.

Id. at 882. *See also Mitsubishi Motors Corp.*, 473 U.S. at 628 (arbitration affects only forum in which disputes are resolved, not parties' substantive rights).

B. Permitting Reinsurers To Compel Arbitration Of Disputes With Insolvent Insurance Companies Under The FAA Would Not Impair Oklahoma's Centralized Delinquency Proceedings

The Fifth Circuit also erred when it concluded that enforcement of Petitioners' request for arbitration would "invalidate, impair, or supersede" Oklahoma's insurer insolvency law. Indeed, this error is evident on the face of the opinion. The court of appeals could not rationally conclude that enforcement of the parties' arbitration agreement under the FAA impairs the Oklahoma scheme without finding some inconsistency between the federal law and Oklahoma's laws respecting arbitration. Yet, it found no such inconsistency. To the contrary, the court acknowledged that, applying Oklahoma law, "[t]he Oklahoma state court might well decide to order arbitration of this dispute." Pet. App. 22a n.5. In light of that concession, the Fifth Circuit had no basis to conclude that Oklahoma law reverse preempts the FAA.

More generally, the court had no basis to conclude that resolution of the parties' dispute before an arbitral panel would interfere with the state court's administration of Respondent's delinquency proceedings. In this regard, the position of the Fifth Circuit (and that of the Tenth Circuit in *Davister*) conflicts head-on with the position taken by the Third and Ninth Circuits, both of which have squarely held that the arbitration of a dispute between a reinsurer and an insolvent insurer does not interfere with a state's centralized delinquency scheme. *See Grode*, 8 F.3d at 960 (arbitrators' resolution of dispute between insurer and reinsurer does not impair State's ability to administer the claims process applicable to policyholders); *Bennett*, 968 F.2d at 972-73 (forum in which the dispute between reinsurer and insurer is resolved does not affect the parties' substantive state-law rights).

Although *Bennett* and *Grode* both involved claims brought by an insolvent insurer against a reinsurer, the reinsurers' status as plaintiffs in this action does not warrant a different result. It is equally true that the adjudication of *in personam* claims against an insolvent insurer outside of the liquidation court does not impair a state's administration of a centralized liquidation scheme. In *Murff* the Eighth Circuit held that the McCarron-Ferguson Act does not preclude a federal district court from entertaining a suit brought against an insolvent insurer under the ADEA, notwithstanding that the liquidation court had issued a blanket injunction under Missouri's version of the UILA purporting to stay all actions against the insolvent insurer. The court of appeals concluded that resolution of the ADEA suit in federal district court would not "so substantially impair" the operation of Missouri's insolvency statute as to warrant the surrender of federal jurisdiction. 97 F.3d at 292. In contrast to the Fifth Circuit, Pet. App. 23a-24a, the court in *Murff* correctly recognized that the question is not whether resolution of the case by a forum other than the state liquidating court violates the liquidating court's blanket injunction—it did—but instead whether resolution of the case by a forum other than the state court impairs the integrity and administration of the state court's delinquency proceedings. By focusing narrowly on the injunction, rather than on the underlying state proceedings, the Fifth Circuit's analysis effectively leaves the reverse preemption of federal law to the unfettered discretion of state judges.

Similarly, in *Fragoso*, where the defendant insurer had entered into liquidation after the appeal was docketed, the court of appeals rejected the liquidator's argument that *Burford* abstention was required to prevent undue interference with the Puerto Rico court's orderly liquidation of the insurer. The First Circuit reasoned that its continued exercise of jurisdiction over the appeal would have "at most an indirect effect on the liquidator's claims process by potentially giving rise to an additional claim against the

insolvent insurance company," and thus would "neither discombobulate local proceedings nor frustrate the Commonwealth's regulatory system." 991 F.2d at 884.

The courts of appeals' decisions in *Murff* and *Fragoso* follow from the long-settled principle that the adjudication of an *in personam* claim against a company in receivership does not impair the receiver's administration of the company's assets or the payment of its creditors. More than fifty years ago, in *Morris v. Jones*, 329 U.S. 545 (1947), this Court squarely rejected the suggestion that principles of comity bar a state court from exercising jurisdiction over an *in personam* claim against an insurance company during the pendency of liquidation proceedings. In terms that apply equally here, the Court explained that "[t]he establishment of the existence and amount of a claim against the debtor [in a forum other than the liquidation court] in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have." *Id.* at 549. These principles have been applied consistently in a variety of contexts.[11]

Collectively, this Court's cases establish that the adjudication of the merits of an *in personam* claim against

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11 *See, e.g., Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp.*, 489 U.S. 561, 575 (1989) (rejecting FSLIC's argument that judicial adjudication of claims outside FSLIC's administrative process would interfere with its liquidation powers, noting that "it was well established at common law" that suits determining the existence or amount of a claim did not interfere with a liquidation court's jurisdiction or the liquidation process); *Markham v. Allen*, 326 U.S. 490, 494 (1946) (rejecting the claim that adjudication of an *in personam* action in federal court against an estate would interfere with probate proceedings in state court, because the *in personam* judgment would not cause any direct interference with property in possession or custody of a state court, despite the fact that the probate court would be bound to recognize the validity of the judgment entered by the federal court when distributing assets); *Commonwealth Trust Co. v. Bradford*, 297 U.S. 613, 620 (1936) (no conflict between state and federal court jurisdiction in national bank liquidation action).

an insolvent party in a forum other than the state court does not affect the substantive rights of the parties, disturb the possession of the state court, affect the priority of the claimants, or otherwise interfere with the liquidation process. It follows as a matter of law that arbitration of the parties' *in personam* dispute in this case would not impair Oklahoma's delinquency proceedings so as to trigger reverse preemption under the McCarron-Ferguson Act. The Fifth Circuit concluded otherwise only by ignoring this Court's teachings.[12]

II. STATE COURTS CANNOT ENJOIN PARTIES FROM SEEKING FEDERAL REMEDIES IN FEDERAL COURT

Although the Fifth Circuit professed that it was "not saying that a State has the power to enjoin a party generally from pursuing remedies in federal court," Pet. App. 25a, its decision cannot be read otherwise. By holding that Petitioners' federal suit interferes with the state court's blanket injunction against "the commencement or prosecution of any actions ... against the insurer" in a forum outside the liquidating court, Pet. App. 24a, while at the same time conceding that the state court might itself compel arbitration of the parties' dispute under state law, Pet. App. 22a n.5, the court of appeals effectively enforced a state court injunction barring petitioners from pursuing their FAA remedies in federal court. This aspect of the Fifth Circuit's decision creates yet another conflict with the decisions of this Court and other courts of appeals and generates added confusion in the law.

In *Donovan v. City of Dallas*, 377 U.S. 408 (1964), this Court made clear that "[w]hile Congress has seen fit to authorize courts of the United States to restrain state-court

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[12] In this case, both the suit to compel arbitration and the underlying dispute to be arbitrated are *in personam* proceedings. *See* Pet. 12-13.

proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions." *Id.* at 412-13 (footnotes omitted). *Accord, e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *United States, ex rel., Council of Keokuk*, 73 U.S. (6 Wall.) 514, 517 (1867); *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166, 194-96 (1867); *see also General Atomic Co. v. Felter*, 434 U.S. 12, 17 (1977) ("rights conferred by Congress to bring *in personam* actions in federal courts are not subject to abridgment by state-court injunctions, regardless of whether the federal litigation is pending or prospective").

The Fifth Circuit's conclusion that Congress impliedly "relax[ed]" this long-settled rule when it passed the McCarron-Ferguson Act, Pet. App. 24a-25a, conflicts directly with the Eighth Circuit's decision in *Murff*. In *Murff*, as here, the state court order placing the insolvent insurer into liquidation contained an anti-suit injunction. 97 F.3d at 290. Indeed, Missouri's insurer insolvency act provided expressly that, once a liquidation order was issued, no action could be maintained outside the liquidating court. *Id.*; *see* Mo. Rev. Stat. § 375.1188(1). The Eighth Circuit, however, rejected the suggestion that the plaintiff was prohibited from bringing his action in federal court. 97 F.3d at 290 n.2 ("A state court cannot, of course, enjoin federal court actions"). *Cf. Fragoso*, 991 F.2d at 882 (reaching the same conclusion in abstention case).

Even if the McCarron-Ferguson Act in theory could enable a state to reverse preempt federal courts' subject matter jurisdiction, the Fifth Circuit had no basis to conclude that, OUILA reverse preempts the jurisdiction of a federal district court, sitting in diversity, to resolve the arbitrability of a dispute between a reinsurer and an insolvent insurance company. As discussed above, under this Court's precedents, a state statute purporting to

centralize the litigation of the merits of disputes involving the insolvent insurer in a single state tribunal is not a law enacted to regulate the business of insurance, and arbitration of a dispute between a reinsurer and an insolvent insurer does not impair a state delinquency proceeding. The question of which tribunal is to decide whether particular non-policyholder disputes are arbitrable is even a further step removed from the state's core interest in regulating and protecting policyholders. *See Moses H. Cone Memorial Hosp.*, 460 U.S. at 20 (noting that whether a dispute is arbitrable does not "depend[] at all on which court decides the question of arbitrability," and that a "decision to allow [the arbitrability] issue to be decided in federal rather than state court does not cause piecemeal resolution of the parties' underlying disputes"). State laws purporting to vest in state court the decision whether a dispute is arbitrable are therefore even more clearly outside the scope of the McCarron-Ferguson Act.

III. THE FIFTH CIRCUIT'S DECISION UNDERMINES IMPORTANT FEDERAL INTERESTS

The FAA was enacted specifically to overcome a historic judicial hostility to the enforcement of private arbitration agreements. *Allied Bruce-Terminix Co. v. Dobson*, 513 U.S. 265, 270-71 (1995). The FAA's central and overriding mandate is that arbitration agreements "shall be valid, irrevocable, and enforceable" in accordance with the rules applicable to other contracts. *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 474 (1989); 9 U.S.C. § 2. By virtue of its enactment, this Court has held that "state courts cannot apply state statutes that invalidate arbitration agreements." *Allied Bruce-Terminix*, 513 U.S. at 272. Yet, according to the Fifth Circuit, a state court may apply a state insurer insolvency statute that invalidates arbitration agreements. The Fifth Circuit's decision in this case directly undermines the "substantial federal concern for the enforcement of arbitration agreements." *Quackenbush*, 517

U.S. at 728-29, and as explained above, contributes to a growing confusion among the lower courts over the scope and application of the McCarron-Ferguson Act.[13]

Because state insolvency laws almost universally contain jurisdictional provisions similar to those at issue in this case, if the Fifth Circuit's decision is not reversed, it will have significant and detrimental effects on the domestic and international reinsurance industry, in which the need vigorously to enforce the FAA is of special importance. As set forth, arbitration clauses have been almost "universally included in reinsurance contracts," R. Carter, *Reinsurance* 146 (1979), in order to reduce the costs, hostilities, and delays engendered by litigation, and to permit resolution of controversies by experts familiar with industry custom and usage. *Prudential Lines, Inc. v. Exxon Corp.*, 704 F.2d 59, 63 (2d Cir. 1983). In light of the number of insurance insolvencies that have occurred in recent years, *see supra* at 2, n.2, the Fifth Circuit's decision threatens to increase significantly the costs of resolving reinsurance disputes.

These effects are particularly significant in light of the international character of the reinsurance industry.[14] Today, there are more than 2500 reinsurers worldwide, Reinsurance Association of America, *Alien Reinsurance in the U.S. Market: 1996 Data 3 (1998)*, and "reinsurers outside the United States account for approximately 42% of all

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13 Whether an insolvent insurance company can be compelled to arbitrate disputes arising from a reinsurance contract is now one of the most widely litigated issues relating to reinsurance. *See* Robert M. Hall, Comment, *Recent Case Developments on Arbitration in US Receiverships*, 1 Int'l J. Ins. L. 51, 51 (Jan. 1998); John H. Binning & Timothy L. Moll, *Arbitration of Reinsurance Disputes in Liquidation of Insurance Companies*, 32 Tort & Ins. L.J. 937 (1997).

14 Although enforcement of international arbitration agreements is governed by a separate chapter of the FAA, 9 U.S.C. §§ 201-08, because the Fifth Circuit's decision turned on its interpretation of the McCarron-Ferguson Act, and not the text of the FAA, it would vitiate international arbitration agreements just as it vitiated the domestic agreement at issue in this case.

reinsurance in the United States. *Id.* at 13. As this Court has recognized, a "contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974). For this reason, the "parochial refusal by the courts of one country"—or, as here, one state—to "enforce an international arbitration agreement" may "damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.*

CONCLUSION

This Court has repeatedly intervened when decisions by the lower courts have failed to enforce bargained-for rights to arbitration—particularly where, as here, the decisions threaten the ability of U.S. companies to engage effectively in international commerce. *See, e.g., Fabe*, 508 U.S. 491; *Mitsubishi Motors Corp.*, 473 U.S. 614; *Scherk*, 417 U.S. 506. Regrettably, this case necessitates the same corrective action. *Amici* respectfully urge this Court to grant the petition for a writ of certiorari, and to reverse the decision of the court of appeals.

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